

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jan 23, 2024

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

LUIS OSVALDO HERNANDEZ,

Defendant.

NO. 1:22-CR-02088-SAB-1

**ORDER DENYING MOTION TO
DISMISS**

Before the Court is Defendant's Motion to Dismiss Case, ECF No. 66. A hearing on the motion was held on December 19, 2023. Defendant was present out of custody and was represented by Jennifer Barnes. The United States was represented by Christopher Bridger.

Defendant asks the Court to dismiss the Indictment pursuant to Fed. R. Cr. P. 12(b)(1). He asserts the statute under which he is charged, 18 U.S.C. § 922(g)(1) is unconstitutional both facially and as applied to the facts of his case. Defendant relies on the recent United States Supreme Court case of *New York State Rifle & Pistol Ass'n v. Bruen*¹ to argue that the newly adopted narrowed "text and tradition" approach to the Second Amendment's scope mandates that the crime set forth in § 922(g)(1), that is, being a felon in possession of a firearm or ammunition,

¹ 597 U.S. 1 (2022).

1 is unconstitutional. Because his possession of ammunition comes within the
2 Second Amendment's plain text, he asserts his conduct is presumptively protected
3 under the Second Amendment.

4 The United States assert that § 922(g)(1) remains good law, and nothing in
5 *Bruen* warrants dismissal of the Indictment. It argues Ninth Circuit precedent,
6 specifically *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010) recognizes
7 that felons are categorically different from individuals who have a fundamental
8 right to bear arms. For the reasons stated below, the Court denies Defendant's
9 motion.

10 **Motion Standard**

11 Fed. R. Cr. P. 12(b) states: "A party may raise by pretrial motion any
12 defense, objection, or request that the court can determine without a trial on the
13 merits." Fed. R. Cr. P. 12(b). Dismissal is warranted if an indictment sought under
14 a statute that is unconstitutional on its face or applied. *United States v. Lopez*, 514
15 U.S. 549 (1995); *United States v. Mayer*, 503 F.3d 740, 747 (9th Cir. 2007).

16 ***New York State Rifle & Pistol Ass'n v. Bruen***

17 In *New York State Rifle & Pistol Ass'n v. Bruen*, the U.S. Supreme Court
18 established a new test to determine whether a firearm regulation comports with the
19 Second Amendment. 597 U.S. 1 (2022).² First, courts must ask whether "the
20 Second Amendment's plain text covers an individual's conduct." *Id.* at 24. If it
21 does not, then the firearm regulation is categorically unprotected, the statute is
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23 ²Prior to *Bruen*, the Ninth Circuit applied a two-step approach: it would "(1)
24 determine whether the challenged law affects conduct historically protected by the
25 Second Amendment; and (2) if so, apply varying levels of scrutiny to review the
26 constitutionality of the arms regulation, depending on how close the conduct
27 affected by the law lay to the 'core' of the Second Amendment right to 'keep and
28 bear arms.'" *Teter v. Lopez*, 76 F.4th 938, 947 (9th Cir. 2023) (citations omitted).

1 valid, and no further analysis is necessary. *Id.* If the Second Amendment’s text
2 covers the conduct at issue, the conduct is considered presumptively protected.
3 Court must then determine whether the government has met its burden to justify its
4 regulation by demonstrating that it is consistent with this Nation’s historical
5 tradition of firearm regulation. *Id.* If a firearm regulation is consistent with
6 historical tradition, the individual’s conduct falls outside the Second Amendment’s
7 protections and the statute is constitutional. *Id.*

8 **U.S. Supreme Court dicta**

9 In *District of Columbia v. Heller*, the U.S. Supreme Court considered the
10 constitutionality of a Washington D.C. ban on handgun possession within the home
11 for the purposes of self-defense. 554 U.S. 570 (2008). In holding the ban was
12 unconstitutional, the U.S. Supreme Court noted that “nothing in our opinion should
13 be taken to cast doubt on longstanding prohibitions on the possession of firearms
14 and the mentally ill” although it did not explain why this was so. *Id.* at 626.

15 In *McDonald v. City of Chicago*, the U.S. Supreme Court held that the right
16 to keep and bear arms applies to the States under the Due Process Clause. 561 U.S.
17 742, 759 (2010). In so doing, it cited to *Heller* and noted that its holding “did not
18 cast doubt on longstanding regulatory measures, such as the ‘prohibitions on the
19 possession of firearms by felons,’ but again failed to explain why. *Id.* at 786 (“We
20 repeat those assurances here. Despite municipal respondents’ doomsday
21 proclamations, incorporation does not imperil every law regulating firearms.”).

22 Finally, in *Bruen*, Justice Kavanaugh and Chief Justice Roberts cited to
23 *Heller* and *McDonald* to reiterate that nothing in the *Bruen* opinion should be taken
24 to cast doubt on longstanding prohibitions on the possession of firearms by felons
25 and the mentally ill. 597 U.S. at 81.

26 ***United States v. Vongxay***

27 *United States v. Vongxay* was issued after the *Heller* opinion. 594 F.3d 1111
28 (9th Cir. 2010). It held that nothing in *Heller* can be read legitimately to cast doubt

1 on the constitutionality of § 922(g)(1). *Id.* at 1114. It noted that the right secured
2 by the Second Amendment is not unlimited and recognized longstanding
3 prohibitions on the possession of firearms by felons and the mentally ill, laws
4 forbidding the carrying of firearms in sensitive places such as schools and
5 government buildings, and laws imposing conditions and qualifications on the
6 commercial sale of arms. *Id.* at 1117. It held that felons are categorically different
7 from the individuals who have a fundamental right to bear arms. *Id.* “Thus, there
8 appears to be a consensus that, even given the Second Amendment’s individual
9 right to bear arms, felons’ Second Amendment rights can be reasonably restricted.”

10 Importantly, however, is that *Vongxay* relied on *United States v. Younger*,³
11 which held that the Second Amendment did not give individuals the right to bear
12 arms. *Younger* was later invalidated by *Heller*. Even so, the Ninth Circuit in
13 *Vongxay* concluded that it was still bound by *Younger*.

14 ***Teter v. Lopez* (9th Cir.)**

15 In *Teter v. Lopez*, at issue before the Ninth Circuit was whether Hawaii’s
16 statute that made it a misdemeanor to knowingly manufacture, sell, transfer, or
17 possess a butterfly knife, with no exceptions, was prohibited by the Second
18 Amendment. *Teter v. Lopez*, 76 4th 938, 942 (9th Cir. 2023). In answering this
19 question, the Ninth Circuit applied the test set forth in *Bruen*, finding first that
20 bladed weapons facially constitute “arms” within the meaning of the Second
21 Amendment. *Id.* at 949. It concluded that because the plain text of the Second
22 Amendment includes bladed weapons, which also includes butterfly knives, the
23 Second Amendment “presumptively guarantees keeping and bearing such
24 instruments for self-defense.” *Id.* (quotation omitted). It then required Hawaii to
25 show that the statute at issue was consistent with this Nation’s historical tradition
26 of regulating weapons. *Id.* at 950.

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28 ³398 F.3d 1179, 1192 (9th Cir. 2005).

1 The Ninth Circuit agreed that the statute purportedly addressed a general
2 societal problem of easily concealable, foldable knives being used in crimes which
3 was a problem that had persisted since the 18th century. *Id.* But, it noted that
4 Hawaii failed to provide any analogues where Congress or any state legislature
5 imposed an outright ban on the possession of pocketknives to remedy this problem
6 “near 1791 or 1868.” Instead, the record showed that earlier generations addressed
7 the societal problem of knife violence through other means than outright bans on
8 certain types of pocketknives. As such, the statute violated the Second
9 Amendment.

10 ***Baird v. Bonta (9th Cir.)***

11 In *Baird v. Bonta*, the plaintiffs challenged the California licensing regime
12 that effectively established a statewide ban on openly carrying handguns by
13 ordinary law-abiding Californians. 81 F.4th 1036, 1039 (9th Cir. 2023). In finding
14 the district court applied an incorrect standard in ruling on a motion for preliminary
15 injunction, the Ninth Circuit noted the correct test was set forth in *Bruen*, that is,
16 “if the Second Amendment’s plain test covers the regulated conduct, the regulation
17 will stand only if the government can affirmatively prove that its firearm regulation
18 is part of the historical tradition that delimits the outer bounds of the right to keep
19 and bear arms in the United States.” *Id.* at 1043 (quotation omitted). It recognized
20 that the *Bruen* standard for identifying a closely analogous historical regulation is a
21 demanding one and requires court to pay close attention to the enforcement and
22 impact of various regulations. *Id.* at 1047. In doing so, the Circuit cites to *Atkinson*
23 *v. Garland*, 70 4th 1018 (7th Cir. 2023) (remanding case challenging
24 constitutionality of 18 U.S.C. 922(g) to district court to conduct a complete
25 historical analysis); *United States v. Daniels*, 77 4th 337, 348 (5th Cir. 2023)
26 (finding 18 U.S.C. § 922(g)(3), which bans an individual from possessing a firearm
27 if they are an “unlawful user” of a controlled substance, unconstitutional), and
28 *Range v. Atty. Gen.*, 69 F.4th 96, 98 (3d Cir. 2023) (holding that despite the

1 defendant's false statement conviction, he remained among "the people" protected
2 by the Second Amendment and finding § 922(g) unconstitutional because the
3 Government did not carry its burden of showing that the Nation's history and
4 tradition of firearm regulation supports disarming a non-violent felon.)

5 **Analysis**

6 As an initial matter, the Court concludes that it can no longer rely on
7 *Vongxay* to answer the question as to whether § 922(g)(1) is constitutional. First,
8 the opinion rests on *Younger*, an opinion that it is at odds with U.S. Supreme Court
9 precedent. Second, the Ninth Circuit in *Vongxay* relied on other circuit court cases
10 that had applied the means-end scrutiny, which the U.S. Supreme Court rejected in
11 *Bruen*. Third, in *Vongxay*, the Ninth Circuit acknowledged the historical question
12 regarding felon disarmament had not been definitively resolved, citing to a law
13 review article that argued that bans on felon gun possession are neither long-
14 standing nor supported by common law in the founding era. Finally, the more
15 recent Ninth Circuit cases of *Teter* and *Baird* suggest the Ninth Circuit would
16 apply *Bruen* to challenges to 18 U.S.C. § 922.

17 This does not resolve the issue, however, because the U.S. Supreme Court
18 continues to instruct that the Second Amendment jurisprudence either does not
19 apply nor does not invalidate longstanding prohibitions on the possession of
20 firearms and ammunition by felons. *See supra*. The Court believes it is bound by
21 these directives from the U.S. Supreme Court. *See Valladolid v. Pacific Operations*
22 *Offshore, LLP*, 604 F.3d 1126, 1131 (9th Cir. 2010). As such, Defendant's Motion
23 to Dismiss is denied.

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Accordingly, **IT IS HEREBY ORDERED:**

1. Defendant's Motion to Dismiss, ECF No. 66, is **DENIED**.

2. A pretrial conference is **set** for **February 14, 2024**, at **9:00 a.m.**, in **Yakima**, Washington.

3. Pursuant to 18 U.S.C. § 3161(h)(D)(A), the time between November 13, 2023, the date the motion was filed, until February 14, 2024, the date of the status hearing, is **DECLARED EXCLUDABLE** for purposes of computing time under the Speedy Trial Act. The Court finds that the ends of justice served by such a continuance outweigh the public's and Defendants' interest in a speedy trial

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this Order and furnish copies to counsel.

DATED this 23rd day of January 2024.



Stanley A. Bastian

Stanley A. Bastian
Chief United States District Judge